LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUN 21 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

671

SAMUEL TITTO WILLIAMS,
Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION BY APPELLANT FOR RE-HEARING AND FOR STAY OF MANDATE.

JOHN F. FINERTY,
Counsel for Appellant,
120 Broadway,
New York 5, N. Y.

June 21, 1949

Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

SAMUEL TITTO WILLIAMS, *Appellant,* *against* PEOPLE OF THE STATE OF NEW YORK, *Appellees.*	APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION BY APPELLANT FOR RE-HEARING AND FOR STAY OF MANDATE.

Despite the very real gratitude which counsel signing this petition* feels toward the Court for the consideration shown him personally during the somewhat unconventional course of this case, counsel believes that real respect toward this Court and toward his own obligations as a member of its Bar, requires that he make the following statements in support of this petition for a re-hearing and for stay of mandate.

Counsel asserts that in his considered opinion every major assumption of fact or of law in the majority opinion

*Counsel signing this petition was unwilling for his associates to sign it, and thereby to assume responsibility for its grave assertions, since the time available made it impossible for counsel to inform his associates even of the nature of such assertions and of the grounds believed to support them, not to speak of permitting him to obtain the valuable help of his associates by way of criticism or suggestions.

is, without exception, demonstrably unsound or obviously misapplied; therefore that the majority opinion can afford no proper basis for a final disposition of a concededly "serious and difficult question" of constitutional law, and that a refusal of this Court to re-consider that opinion can only be at the risk of a shocking miscarriage of justice.

No zeal of an advocate could excuse such grave assertions without the most substantial basis for them in fact and in law. They therefore should be answered and rebuked, or recognized and corrective measures taken. Under no circumstances, it is most respectfully submitted, would it seem this Court could be justified in adopting the other course only too easily open to it, that is, by a mere denial of this petition, to ignore such assertions without undertaking either to refute or admit them.

Counsel realizes that this petition should without avoidable delay proceed to set forth the precise grounds which it is believed justify the grave assertions made in it. Counsel believes, however, that brief delay in doing this is warranted in order to direct attention to the unusual circumstances under which this petition is submitted, and presumably must be considered.

The majority decision was made on June 6, 1949, but was not received by counsel until June 7. Under Rule 33 of this Court, as amended October 13, 1947, the time for filing a petition for re-hearing was shortened from the former period of twenty-five days after judgment, to fifteen days "after judgment or decision", unless such time is shortened or enlarged by the Court or a Justice thereof. On June 9 counsel applied to this Court for enlargements of time both for the filing of a petition for re-hearing and for the issuance of a mandate (a), because certain cir-

cumstances, not necessary here to elaborate, made the fifteen days prescribed by amended Rule 33 wholly inadequate for the proper preparation of a petition, and (b), because the brief time remaining before the end of this Term seemed to make it practically impossible for the Court to give adequate consideration to any petition that might be filed within the time prescribed. These enlargements were inexplicably denied* despite the humane agreement of counsel for the appellees, the District Attorney of Kings County of New York, Miles F. MacDonald, not to object to such enlargements, of which agreement this Court was fully advised.

Despite the denial of adequate time for preparation of this petition, counsel feels justified in asserting that the petition itself is adequate in substance. Had time for revision been available, the petition could probably have been slightly shortened. It, however, is not substantially longer than would in any event have been necessary for any serious and considered analysis of the majority opinion in relation to the grave assertions here made against its validity.

Counsel therefore respectfully submits that unless the members of this Court feel justified in concluding from such cursory perusal of this petition as alone would seem possible within the time remaining of this Term, that it is obviously and undeniably frivolous and improvident, it would be difficult for this Court to justify undertaking to dispose of this petition before the end of this Term. Counsel

---

*Counsel desires to make entirely clear that he does not, and from his own experience could not, attribute such denial to any lack on the part of the Court of personal consideration for counsel. Moreover such enlargements were not requested on any such ground, but because they then seemed, and still seem, essential to an adequate opportunity to protect the life of his client from possibly unconstitutional deprivation.

therefore trusts that the members of this Court, and particularly the members of the majority in this case, will recognize that in order to reach a considered and sound conclusion as to whether a re-hearing should be accorded, it is essential that the issuance of the mandate be appropriately stayed beyond the time now specified by Rule 34 of this Court.

This petition will now proceed to a specification of the asserted invalidities in the majority opinion and of the grounds for such assertions:

SPECIFICATION OF MAJOR ASSUMPTIONS OF LAW OR OF FACT IN THE MAJORITY OPINION, WHICH IT IS ASSERTED, ARE EITHER DEMONSTRABLY UNSOUND OR OBVIOUSLY MISAPPLIED, WITH GROUNDS BELIEVED TO SUPPORT SUCH ASSERTIONS.

Though it would be preferable to consider the major assumptions of law and of fact in the majority opinion in their logical order or in the order of their importance, the structure of that opinion is such as to make it impractical to consider them except in the order in which they there first appear.

Counsel would like to lessen the burden on the Court by directing attention to those specifications which are most important. An attempt to do this convinces counsel that, with the possible exception of specifications "I" and "II", which are relatively unimportant to the essential issues on this appeal,* it is impossible to differentiate between the importance of the other specifications.

---

*Even the assumptions considered in these two specifications, it will be shown, appear to play a part in influencing the assertedly fallacious conclusions of the majority opinion, beyond the proper importance of the assumptions, themselves.

I.

The majority opinion states, p. 2:

> "The evidence proves a wholly indefensible murder committed by a person engaged in a burglary."

It is clear that the majority report assumes, moreover, the identity of appellant with such person. It does not appear from the majority opinion whether this assumed identity is based merely on the acceptance by the majority of the jury's verdict of guilt, or on an independent examination of the entire evidence before the jury in this respect, contained in the transcript of record from the County Court of Kings County, which while filed in this Court, was not printed except as to the portion showing "proceedings on sentence".

In either respect, it ignores the only reasonable conclusion to be drawn either from the record as a whole or from the jury's verdict itself, that is, that the jury's recommendation of life imprisonment is wholly irreconcilable with any certainty on the part of the jury that the evidence before it proved beyond a reasonable doubt the identity of appellant with the person guilty not only of a "wholly indefensible murder", *but of a peculiarly brutal murder.*

That there is good basis in the record for the jury's obvious assumption that the evidence did not prove this beyond a reasonable doubt, appears from the following:

(1) The record shows that the only eyewitness to the murder, the nine-year old brother of the murdered girl, was not asked on direct examination as a witness for the State expressly to state whether the murderer

was a white man or a negro (Tr. 86-103).* The obvious reason for this developed on cross examination where it was shown that immediately after the murder the boy had told the police that the murderer was a white man of ruddy complexion, and that he at first unequivocally so admitted (Tr. 103). The record shows (Tr. 117-124) that only after obvious coaching during over-night recess, did he attempt to qualify this description of the murderer, by claiming that the light made it impossible for him to be sure whether the murderer was a white man or a negro. Further cross examination (Tr. 130-133) made this coaching so obvious that in order to stop it the prosecutor voluntarily stated (Tr. 133):

> *"* * * there is no contention by the People that this witness can identify this defendant or that he ever has".*

(2) It is not here denied that the State rested wholly on appellant's alleged confessions, which appellant testified, and witnesses for the State denied, had been extorted from the defendant. (See detailed transcript references under "X", *post*.)

The only reasonable assumption, therefore, is that although the jury found the defendant guilty of a peculiarly brutal murder, it recommended life imprisonment because it was in reality doubtful of guilt due to the State's admitted lack of any identification of appellant as the murderer, and the conflicting evidence as to whether appellant's confessions had or had not been extorted.

---

*References in parentheses designated "Tr.", are to pages of those portions of the transcript of record from the County Court of Kings County, filed in this Court but not printed. References in parentheses designated "R" are to pages of the printed record in this Court.

Moreover that the avowed purpose of enacting Section 1045-A of the Penal Code of the State of New York, under which the jury here was authorized to make its recommendation of life imprisonment was not primarily humanitarian, as the majority opinion assumes, but was to make "it easier" to obtain convictions in doubtful cases of felony murder, is clear from the annual message of the Governor of that State on January 6, 1937, advocating, among other things, the enactment of that section. The Governor's message in this respect is quoted verbatim in the footnote*.

---

*The Governors message in this respect reads as follows:

"While discussing the anti-crime program, I wish to bring once more to your attention, a somewhat related matter which has long been on my mind. That is, the necessity of changing the Penal Law on felony murder. Under our existing law, in the event that a murder occurs during the commission of any felony, all those involved are held equally responsible and if found guilty, must be sentenced to death. The jury has absolutely no discretion. The verdict must either be acquittal or murder in the first degree, for which the penalty is death. In other cases of murder, the jury has the right to bring in verdicts of murder in the first degree, murder in the second degree, or manslaughter. *As the result of the limitation placed on the jury in felony murder cases, the jury is faced with the choice of condemning to death a man for whom it would like to show some clemency or, on the other hand, of letting him go completely unpunished.* I believe that the sentence for felony murder should continue to be death—the same as for premeditated murder.

"However, I would empower a jury to accompany any verdict of guilty with a recommendation of executive clemency in which case the sentence shall not be death, but imprisonment for life. *My reasons for this recommendation are two-fold: the first is that it will make it easier for the jury to bring in verdicts of guilty in felony murder cases. In the second place, it will permit the jury to fit its verdict to what it may consider to be the varying degrees of moral guilt of the persons involved in the same crime.*

"I strongly recommend this change."

It will be observed from the two italicized portions of that quotation that the Governor's message, with revealing naivete, makes this primary purpose of Section 1045-a unmistakably clear.

II.

The majority opinion states, p. 3:

> **"About five weeks after the verdict of guilty with recommendation of life imprisonment, and after a statutory pre-sentence investigation report to the judge, the defendant was brought to court to be sentenced. Asked what he had to say, appellant protested his innocence. After each of his three lawyers had appealed to the Court to accept the jury's recommendation of a life sentenc the judge gave reasons why he felt that the death sentence should be imposed. He narrated the shocking details of the crime as shown by the trial evidence, *expressing his own complete belief in appellant's guilt."**

While it is true that the judge did express "his own complete belief in appellant's *guilt*", and therefore his agreement with that portion of the jury's verdict based on the evidence before the jury, *the majority opinion neglects to note that nowhere did the judge express disagreement with the other integral part of the jury's verdict, its recommendation of punishment by life imprisonment,* as based *solely* on the evidence before the jury, which evidence concededly had been subjected to cross-examination and rebuttal.

Indeed, the majority opinion, p. 1, implicitly recognizes this where it states:

> "In giving his reasons for imposing the death sentence, the judge discussed in open court the evidence upon which the jury had convicted, *stating*

*Throughout this petition italics and parenthetical matter in quotations are supplied unless otherwise stated.

that this evidence had been considered in the light of additional information obtained through the Court's 'Probation Department' and through other sources."

In other words, it is clear from the majority opinion itself, that the judge's refusal to accept the jury's recommendation of life imprisonment and his sentencing of appellant to death, was not based *solely* on evidence before the jury which had been subjected to cross-examination and rebuttal, but only on such evidence when considered in connection with the "additional information" narrated by the judge on sentence, which information had not been subjected to any such safeguards.

III.

The majority opinion states, p. 3, immediately following the foregoing statement from that opinion just quoted under "II":

> **"He (the judge) stated that the pre-sentence investigation revealed many material facts concerning appellant's background, *which though relevant to the question of punishment, could not properly have been brought to the attention of the jury in its consideration of the question of guilt.*"**

The majority opinion apparently accepts the correctness of the judge's assumption in this respect. In doing so, it fails to note that, contrary to the judge's assumption, all facts "relevant to the question of punishment" *not only could, but should properly have been brought to the attention of the jury*, not in connection with its consideration of the question of guilt, *but for its consideration in connection with the other integral and indispensable part of its verdict, the question of punishment;* (*People v. Hicks*, 287 N. Y. 165; cf. *Andres* v. *United States*, 333 U. S. 740).

Obviously, moreover, had the alleged facts developed by the pre-sentence investigation been, as they should have been, submitted to the jury, they would have been subject to cross-examination and rebuttal, and neither the trial court, nor this Court would be entitled to speculate whether under such circumstances the jury might, or might not, have made its recommendation of life imprisonment, or if it did, whether the judge would have disagreed with them.*

IV.

The majority opinion proceeds to state, p. 3, immediately following the statements just quoted under "III":

> **"He (the judge) referred to the experiences appellant had had on 30 other burglaries in and about the same vicinity where the murder had been committed. The appellant had not been convicted of these burglaries *although the judge had information that he had confessed to some* and had been identified as the perpetrator of some of the others."**

The only basis which counsel has been able to find in the trial judge's pre-sentence narration, or elsewhere in the record, to support the italicized portion of the above statement from the majority opinion, that "the judge had information that he (appellant) *had confessed to some*" of the 30 other burglaries is the statement in the judges pre-sentence narration (R. 16, 17) that "The defendant stole a wrist watch

---

*While counsel accepts responsibility for failing previously to bring this point specifically to the attention of the Court, either on brief or argument, it is respectfully submitted that this, and other failures on the part of counsel, are accounted for at least in part, by what counsel believes to be the unwarranted haste on which the majority have insisted in the consideration and disposition of a capital case, involving what the majority opinion concedes to be, "a serious and difficult question" of constitutional law.

and a wallet containing some money from her (Rose Spector's) apartment, and admitted this crime to the detectives."

It is on this tenuous basis that the majority opinion, page 7, undertakes inferentially to treat appellant as included in the category of "repeated offenders": It is on this same slender basis that the majority opinion ignores the fact that the statutes here involved, as construed by the Court of Appeals of New York, are fundamentally distinguishable from the repeated offender statutes, the constitutionality of which have been sustained by this Court, on the express basis that such statutes *require proof of conviction of prior offenses*, and permit an accused not only to rebut evidence offered in this respect, but even seasonably to question the lack of constitutional safeguards in connection with such prior convictions.*

V.

The majority opinion further states, pp. 3, 4 and 11:

> **"The accuracy of the statements made by the judge as to appellant's background and past practices were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise." (p. 3)**
>
> * * * *
>
> **"Other due-process requirements mentioned in the *Oliver* case were that the defendant should be permitted to offer evidence in his own behalf and be represented by counsel. Appellant, however, was represented by counsel both when tried and sentenced *and the sentencing judge***

*To this latter effect, particularly, see *Gayes* v. *New York*, 332 U. S. 145, 149, footnote [8].

> *did not decline to permit introduction of any evidence. In response to the judge's inquiry, statements were made by appellant and his counsel*" (footnote 4, p. 4).
>
> * * * *
>
> "Appellant was found guilty after a fairly conducted trial. *His sentence followed a hearing conducted by the judge. Upon the judge's inquiry as to why sentence should not be imposed, the defendant made statements. His counsel made extended argument*" (p. 11).

These obviously related statements in the majority opinion seem peculiarly unfair both because of their apparent factual inaccuracies and of their unjustified legal assumptions:

(1) No opportunity whatever was in fact offered appellant or his counsel to say anything before sentence *after* the judge's narration of the alleged facts developed by his pre-sentence investigation (R. 20). Sentence was pronounced immediately following, and as an integral part of such narration. The only such opportunity offered, and the only statements made by appellant (R. 5, 11) or by his counsel (R. 5-12) were *prior* to the judge's narration.

(2) It must, moreover, be conclusively presumed that any request to the judge after such narration

> "* * * to afford appellant a chance to refute or discredit any of them (statements in the judge's narration) by cross-examination or otherwise."

would have been futile and would have been denied

(a) The basic theory of the majority itself is that no constitutional right exists to refute or discredit, by cross-examination or otherwise, alleged facts developed by pre-sentence investigation, and that any such right, moreover, would be wholly impractical;

(b) This also is the necessary implication from the judgment of the Court of Appeals, since to construe such judgment otherwise, would be for this Court both to impugn the certificate of the Court of Appeals that it had necessarily passed on the constitutional question here presented, and to stultify this Court's own assumption of jurisdiction of this appeal. If, in fact, such constitutional question had been waived by the failure of appellant to ask a chance *after sentence* to refute or discredit the judge's pre-sentence recitals, of which he had no notice when *before such recitals and sentence*, both the certificate of the Court of Appeals and this Court's assumption of jurisdiction would have been unwarranted.

VI.

The majority opinion states, pp. 4, 5 and 6:

> "That due process of law does provide these salutary and time-tested protections (reasonable notice of charges and opportunity to examine adverse witnesses) where the question for consideration is the guilt of a defendant, seems entirely clear from the genesis and historical evolution of the clause". (p. 4)
>
> * * *
>
> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations." (p. 5)
>
> * * *
>
> "Courts have treated the rules of evidence applicable to trial procedure and the sentencing process differently." (Citing Cases). (P. 5, footnote 4)
>
> * * *
>
> "In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures, there are sound practical reasons for the distinction.

> ***In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct*** of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of *collateral issues*. They were also designed to prevent tribunals *concerned solely with the issue of guilt* of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct." (pp. 5-6)

Conceding that these statements in the majority opinion are sound when applied *where the sole question in issue before verdict is that of guilt,* it is obvious that they can have no proper application where, as here, *the question of punishment was equally in issue before verdict,* and its determination was an integral and essential part of the verdict. *The failure of the majority opinion to recognize this,* results in permitting purportedly remedial statutes, such as Section 1045-A* of the Penal Laws of the State of New York, and Section 482 of the Code of Criminal Procedure of that State, *to become traps for the denial of due process of law.*

Any well considered application of the foregoing statements from the majority report would have recognized that where, as under Section 1045-a, the question of punishment *is not a collateral* but is an *essential issue* before verdict, all information necessary to the informed determina-

*As already noted; *ante,* footnote pp. 5, 6, the purpose of this section was, not, primarily at least, to permit the jury to differentiate between degrees of moral guilt, but to "make it easier" to obtain a verdict of guilt in a felony murder case where, because of doubt, the jury might not find such a verdict if capital punishment were mandatory.

tion by the jury should be presented to the jury before verdict, subject to the safeguards of due process which the *Oliver* case holds indispensable to the determination of guilt. *There can be no valid excuse for permitting such constitutional safeguards to be circumvented, as the majority opinion would do, by allowing the judge to withhhold from the jury information essential to their intelligent determination of the issue of punishment, where that issue is an integral and indispensable part of the jury's verdict, and then himself undertake to obtain such information in secret, free of any such constitutional safeguards.*

It would be no answer to this proposition to suggest that the trial judge in this case may not consciously have adopted any such device. *What this Court is reviewing on this appeal is not the motives actuating the judge's conduct,* but whether the statutes of New York, as construed by the Court of Appeals of that State, as authorizing that conduct, have had, and must necessarily have, the same result in depriving an accused of constitutional safeguards, as if the judge's conduct had been intentionally adopted as a device for such purpose.

Neither is it any answer, as the majority opinion assumes, that the exclusion from the jury of evidence of other crimes is "to prevent tribunals *concerned solely with guilt* from being influenced to convict for that offence by evidence that the defendant had habitually been engaged in other misconduct." In cases such as this, where the jury *is equally concerned with punishment* as with guilt, the rights of the defendant presumably can be guarded by appropriate instructions. Certainly this would seem obviously to threaten less danger to a defendant's rights than if a judge be authorized, as here, to inflict capital punishment

on the basis of pre-sentence information secretly received, without any safeguards whatever that the judge may not thus deprive a defendant of his life on the basis of *pre-sentence misinformation, which is irreparable.*

VII.

The majority opinion states, p. 5:

> **"A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in correctional treatment of the defendant . . .'"**

The majority opinion here neglects to state what it would seem should fairly have been stated in considering any *"recent manifestation* of the historical latitude allowed sentencing judges." That is, that the Advisory Committee on Rules of Criminal Procedure appointed by the Court itself, recommended the provision quoted by the Court *with, however, the following additional sentence,* which the Court, in adopting the Rule, deleted without explanation:

> "After determination of the question of guilt, the report shall be available, upon such conditions as the court may impose, *to the attorneys for the parties* and to such other persons or agencies having a legitimate interest therein as the Court may designate." (See Second Preliminary Draft, Federal Rules of Criminal Procedure, February 1944, Rule 34(c)(2), pp. 126-127.)

In addition the majority opinion ignores other such *"recent manifestations"* in this same connection:

(1) While the majority opinion cites (p. 5, footnote 7) *Stephan* v. *United States*, 133 Fed. 2d 87, 100, that opinion seems to ignore the following "recent manifestation," furnished by that citation:

> "We think, however, that such information should have been disclosed to the Judge in open court and in the present of appellant. *Such appears to have been the practice in the cases cited. We think that the interest of convicted persons about to be sentenced is more carefully safeguarded by open hearings under such rules as the court may adopt.*"

(2) The majority opinion fails even to cite *Zeff* v. *Sanford*, 31 Fed. Supp. 736, 738, though this case was cited and quoted by counsel for appellant on argument. There the court said:

> "The situation with respect to securing information to enable the Judge to wisely and justly impose sentence, procured after conviction or the entry of a plea of guilty, is quite different. In such case, under the technique of modern penology, the accused, who is supposedly entering his plea of guilty in open court or standing in open court before the Judge after verdict, is told that his case is to be investigated before imposition of sentence and he, unless he objects, impliedly consents to such investigation. It seems, therefore, perfectly proper for a thorough investigation to be made, after conviction or plea of guilty, of the accused's reputation, past offenses, economic, social and educational background, and of all other matters which a Judge should have before him in determining the kind of sentence which should be imposed. *Even in such cases, however, any information not received from the accused himself or not given in his presence, which might influ-*

ence the judgment, should be called to his attention, without necessarily disclosing the sources of such information, so that he may be afforded an opportunity to object to its use and to rebut same. Even after conviction or plea of guilty, great care should be exercised to see that the accused understands what is taking place and has, before sentence is imposed, a fair and full opportunity to answer charges made against him.

"If progress is to be made in the administration of criminal law and offenders treated in a scientific manner, such latitude must be left to the Judge unless blind and irresponsible judgments are to be imposed. *Pre-sentence investigation,* after conviction or plea of guilty, is the most just, effective and humane method, if *properly used*, of arriving at a sentence *which will protect both society and the accused.*"

It would, therefore, appear that this reference of the majority opinion to Rule 32 of the Federal Rules of Criminal Procedure, as a "recent manifestation of the historical latitude allowed sentencing judges," ignores the fact that the rule itself contravenes the recommendation of the Court's own Advisory Committee for limitations on such "historical latitude", and is also inconsistent with the restrictions on such "historical latitude," which the lower Federal courts have recognized to be necessary to arrive at a sentence "which will protect both society and the accused."

VIII.

The majority opinion states, p. 6:

"A sentencing judge, however, is not confined to the mere issue of guilt. His task within fixed statutory or constitutional limitation is to determine the type and extent of punishment after the issue of guilt has been

> determined. *Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information* possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

It has already been noted under "V", that "restrictive rules of evidence properly applicable to the trial", *should apply to information essential to the issue of punishment*, as well as to the issue of guilt, *where as here the determination of both issues* is, as under Section 1045-A an integral and essential part of the jury's verdict.

Passing this point, however, and conceding that what is highly relevant and essential to a judge's selection of an appropriate sentence, "is the possession of the fullest information possible concerning the defendant's life and characteristics," *the majority opinion wholly ignores that what is still even more relevant and essential* is to safeguard that "the fullest information" shall not, in reality, turn out to be the *fullest misinformation*, because of the failure to require the trial judge to exercise any safeguards whatever in obtaining it.

IX.

The majority opinion states, pp. 6, 7, 8 and 10:

> **"Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." (P. 6).**
>
> * * *
>
> **"This whole country has traveled far from the period in which the death sentence was an automatic and com-**

monplace result of convictions—even for offenses today deemed trivial." (P. 7).

* * *

"Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." (Pp. 7, 8).

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. *In general, these modern changes have not resulted in making the lot of offenders harder.* On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." (Pp. 7 and 8)

* * *

So far as these statements are sound at all—and some of them are—they are grimly ironical when applied to appellant's case. It can be little comfort to appellant to know that the majority opinion does at least record its recognition that "retribution is no longer the dominant objective of criminal law", and that "reformation and rehabilitation of offenders have become important goals of criminal jurisprudence". This must be equally the case with this Court's recognition that "in general, these modern changes have not resulted in making the lot of offenders harder".

But at least two of these statements are not sound.

(1) *The New York statutes, as construed by the Court of Appeals of that State, do not "emphasize a prevalent modern philosophy of penology that the punishment should*

fit the offender and not merely the crime", though undoubtedly, this is the modern philosophy of penology.

Whether the punishment of death here proposed fits either the offender or the crime cannot be answered on this record. The jury, after some three weeks of trial, on the basis of evidence subjected to the safeguards of cross-examination and rebuttal, have said by their verdict that the punishment of death fits neither. Obviously, as already noted, if the jury had actually believed that the evidence proved appellant guilty beyond a reasonable doubt of a peculiarly brutal murder, the only reasonable assumption is that they could not have come to their conclusion that life imprisonment would "fit the crime". The judge, on the other hand, indicates no disagreement with the jury's conclusions, on the basis solely of evidence before the jury, but only on the basis of that evidence when considered in connection with other information secretly received by the judge after verdict. To this information the judge applied no safeguards of cross-examination or rebuttal, which might have enabled him to determine intelligently, whether death provided a "better fit" both for the offender and the crime. In this connection, as will be shown in detail under "X", *post.*, the major and most prejudicial portion of such information did not come from probation reports, but from police officers charged with extorting appellant's confessions.

(2) It has been seen under "VII" that the statement in the majority opinion that "modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes" is in conflict both with the recommendations of this Court's own

Advisory Committee on Rules of Criminal Procedure and with the expressed views of the only Federal Courts which would seem to have considered the question.

X.

The majority report states, pp. 8 and 9:

> **"Under the practice of individualizing punishments, investigational tactics have been given an important role. *Probation workers* making reports of their investigations have not been trained to prosecute but to aid offenders. *Their reports* have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information."**

Here is a statement to which no exception can be taken except in the application made of it by the majority opinion to appellant's case, which again is grimly ironical. Even assuming that the trial judge here was conscientious, there is certainly no evidence of any want on his part to sentence appellant only "on the best available information, rather than on guesswork and inadequate informtaion". The sole indications from his own statements, are to the contrary.

As has already been noted, it appears from the judge's own narration of the pre-sentence information on which he felt justified in undertaking to deprive appellant of his life, that, in its major and more prejudicial parts, it was obtained not from probation reports, but from the very police officers charged with extorting appellant's purported confessions.

As the judge's own statements show, the only portions of the pre-sentence information upon which he acted which were obtained from probation sources, were: appellant's delinquency record as a minor (R. 12); the indication in the probation report that defendant "is a psychopathic liar

and that his personality is permeated with psycho-sexual habits of thought and conduct" (R. 16); and the conclusion of the Probation Department that appellant is "a menace to our society" (R. 19).

All the rest of such pre-sentence information is obviously obtained from police officers who are specifically named in the statement. These are Detectives Rooney, Cullen and Werner, and Patrolmen DeVivo and DiLorenzo (R. 15, 16). All of these officers were charged by appellant, both in his direct testimony and on cross examination, as having extorted his purported confessions by the most brutal methods, (see for instance Tr. 692, 701, 707-712; other record citations are too numerous to be made here). An examination of the record will show, moreover, that while appellant's charges against these officers were detailed and circumstantial, their denials were merely categorical (Tr. 983, 991, 1001-1003, 1010).

While, unfortunately, under this appeal, this Court cannot determine whether or not appellant's purported confessions were in fact extorted, this Court should consider the fact that the record shows that the major and most prejudicial portions of the pre-sentence information, upon which the judge avowedly undertook to justify his rejection of the jury's recommendation of life imprisonment and to justify his own sentence of death, came from the very police officers alleged to have extorted appellant's purported confessions, *whose denials the jury obviously did not wholly credit.* This information consisted largely of unsupported charges that appellant had been guilty of some 30 other burglaries which he had never even been previously charged, much less convicted, and of indecent criminal sexual acts of which he had likewise never been charged.

much less convicted. Of all of these unverified charges the judge avowedly concluded appellant to be guilty, and acting on such conclusions, sentenced appellant to death. This may not serve to impugn the Judge's conciance. Otherwise, however, his conduct cannot be squared with the standards set by the majority report itself for "concientious judges," as such, the

> "want to sentence persons on the best available information rather than on guesswork and inadequate information."

XI

The majority opinion, immediately following the statements just quoted in "X", states as follows, pp. 9 and 10:

> "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the Nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make wholly impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.
>
> "The considerations we have set forth admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence."

These statements are unsound and inapplicable to appellant's case in the following particulars:

(1) Appellant's contentions do not involve depriving sentencing judges of "this kind of information", that is, *the kind of information specified in the majority opinion itself* in the immediately preceding sentence, i.e., *"the best available information rather than guesswork and inadequate information."*

On the contrary, appellant's contentions are consistent with modern penological procedural policies which recognize that a truly conscientious *and intelligent* judge will adopt at least such minimum procedural safeguards against pre-sentence mis-information as those noted under "VII" in connection with the recommendation of this Court's Advisory Committee on Rules of Criminal Procedure, and as suggested in the opinions of the respective federal courts in *Stephan* v. *United States, supra*, and *Zeff* v. *Sanford, supra*. See also appellant's Assignment of Error "2", Brief p. 13.

(2) The remainder of the foregoing statements, so far as appears, rest on pronouncements of the majority opinion, without apparently any precise citation of authority to sustain them. Counsel, however, is able to cite at least one respectable authority which makes the validity of such statements more than doubtful.*

In the Columbia Law Review of April 1949, Volume 49, No. 4, pages 567-572, under the title "Right of Criminal Offenders to Challenge Reports Used in Determining Sentence", these very assumptions of the majority opinion are considered in detail, pp. 570-572, and the conclusion is reached, p. 572, that

---

*Counsel has reason to believe that additional authorities exist of like purport. The Court, however, has denied counsel adequate opportunity to determine this.

> "* * * the risk of injustice to the defendant would seem to outweigh contrary considerations of administrative convenience".

In support of this conclusion, reference is made to the English practice as shown by cited Act of Parliament and by judicial authorities also cited. There are also citations and quotations from American judicial authorities, *pro* and *con*, footnote 15, p. 568, and in footnotes 19, 20 and 21, p. 569. *Appellant's counsel, on argument, furnished this Court with the majority of these citations, but it is notable that the majority opinion neither makes any reference to them,* nor appears to have considered how far they may be inconsistent with its own pronouncements.

XII.

The majority opinion states, p. 10:

> **"The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice."**

It must again be noted that appellant's contentions involve no proposal "for freezing the evidential procedure of sentencing in the mold of trial procedure". (See appellant's Assignment of Error 2, Brief p. 13; also comments under "VII", "VIII" and "XI", *ante.*).

Moreover, the assumption in the majority opinion that the New York statutes, *in denying a convicted person any protection whatever* against the obvious potentiality that, under such circumstances, the judge may base his sentence on pre-sentence *mis-information*, are consistent with "pro-

gressive efforts to improve the administration of criminal justice", is an assumption sustainable only on the same reasoning which is only too widely indulged, that totalitarian concepts are "progressive" in comparison with democratic and republican ones.

XIII.

The majority opinion states, p. 10:

> **"It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention."**

This is one of the most basic and obvious fallacies of the majority opinion. Aside from the possible technical constitutional distinctions in this respect, between capital and non-capital cases, pointed out in appellant's brief, pp. 22-24, there is a fundamental and inescapable distinction.

Assuming that in a non-capital case a convicted defendant is accorded no safeguards such as the right to inspect, cross-examine, or rebut pre-trial information used by the judge as the basis of his sentence, and that it subsequently develops that as a result, such sentence was excessive because based on pre-trial *mis-information,* under the statutes of at least penologically "progressive" jurisdictions, judicial remedies are available to reduce the sentence, or in the absence of judicial remedies, provisions for reduction are generally made in the probation or parole statutes, themselves, or as a last resort, through executive clemency.

No such correction is possible of a capital sentence resulting from pre-trial mis-information resulting from the denial of any procedural safeguards, whatever. A capital sentence based on such mis-information is irreparable in

its finality. For the majority opinion to deny that such a basic distinction exists is to refuse to face the realities with which its conclusion in their respect is wholly inconsistent.

XIV.

The majority opinion states, p. 11:

> **"And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."**

This statement is not an entirely accurate paraphrase of the concessions actually made by appellant's counsel. The first concession appears in the first footnote to page 14 of appellant's brief. The second appears in paragraph (1) of the footnote to page 28 of that brief.

The first concession was that the constitutional question here raised does not involve any contention that the New York statutes may not validly give the trial judge, as they have been construed to do, *People* v. *Cole,* 285 N. Y. 838, discretion to disregard the jury's recommendation of a life sentence and to sentence an accused to death, where such discretion is exercised solely on the basis of evidence received before verdict under safeguards of cross-examination and rebuttal.

The second concession was that while the constitutional point here raised might still have been advanced, it could not have been proved, had the trial judge obtained presentence information precisely as he did here, without any

safeguards of cross-examination or rebuttal, but had omitted his avowals, and had said nothing which would disclose that this information was essentially the basis for his sentence of death.

Counsel now believes that neither was he warranted in making such concessions, nor was the majority opinion warranted in relying on them, since such concessions, either as actually made or as paraphrased in that opinion, have no relation to the realities of this case.

Under Section 482 of the Code of Criminal Procedure of New York,* a judge is expressly *required* before pronouncing sentence, to have submitted to him any reports that may have been made as a result of a mental, psychiatric, or physical examination of a defendant, and in addition is *permitted* to seek any information that will aid him in determining the proper treatment of a defendant. It is highly improbable in view of the duties imposed upon the Probation Department under other sections of the New York statutes, that in any case no reports would be made of mental, psychiatric or physical examination of a defendant. It is reasonable to assume, therefore, that in all cases, a judge, before pronouncing sentence would have such reports before him and might, as here, have additional information, as well, from other sources. Under the assumption of the majority opinion, moreover, it would be wholly impracticable to safeguard any such information by cross-examination, rebuttal or even inspection. In any case, therefore, should the judge reject the jury's recommendation of life imprisonment and sentence a defendant to death, it could neither reasonably nor safely be assumed that in so doing he was wholly un-

*This section is set out verbatim at page ii of Appendix A of appellant's brief.

influenced by such unsafeguarded pre-sentence information, irrespective of any avowals which judge might or might not make in this respect.

XV.

The majority opinion states, p. 11:

> **"The case went to the highest court in the state, and that court had power to reverse for abuse of discretion or legal error in the imposition of the sentence."**

These statements are basically unsound in law and seriously misleading when applied to the facts of appellant's case.

Conceding that the Court of Appeals would have the general power to reverse a sentence for abuse of discretion or for legal error in its imposition, that court, under its own judgment, could not have reversed appellant's sentence in this case on either such ground, since the judgment of that court expressly construes the statutes of the State of New York here in question, as authorizing both the trial court's sentence of death and the precise manner of its imposition (R. 21, 22).

XVI.

The majority opinion states, p. 11, footnote 18:

> **"What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. (See *Townsend* v. *Burke*, 334 U. S. 736)".**

To such extent as this statement is intended, if at all, as any reassurance that, despite the majority opinion in this case, some rights of due process may still attach to sentencing procedure in the receipt of pre-sentence informa-

tion, it is respectfully submitted that so far as such reassurance is not treated—justifiably or otherwise—with complete skepticism, it can only result in increasing applications for *ad hoc* scrutiny in this respect of both capital and non-capital pre-sentencing procedure by one form of review or another.

Counsel respectfully submits that, truly, "progressive efforts to improve the administration of criminal justice", interrelated as they must be with the "modern philosophy of penology", requires this Court to give most careful reconsideration to an opinion *which is reasonably susceptible only of the interpretation that no safeguards of due process of law, whatever, can practicably attach to the receipt by a trial judge of pre-sentence information even in a capital case*, although it seems undeniable that without some safeguards, *pre-sentence misinformation in a capital case* may result in a sentence that is irreparable, while in a *non-capital case* any resulting excessive sentence can be readily mitigated.

XVII.

The majority opinion certainly attempts no express answer to the following basic propositions advanced on behalf of appellant, both on brief and argument, against the constitutionality of the New York statutes here involved, viz:

(1) Due process of law under the 14th Amendment includes as indispensable elements in a capital case, the right of a defendant to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

(2) Since such rights are essential elements of due process of law under the 14th Amendment, a defendant in a capital case is entitled to be protected in them against *any*

agency of the State authorized to deprive him of his life, and *at the point* at which such deprivation is authorized and undertaken.

(3) Where, as here, the statutes of a State authorize the trial judge in a capital case to disregard the jury's recommendation of a life sentence and to sentence an accused to death, such statutes must also require that the trial judge observe such rights *in connection with such sentence of death*, if such rights are to have any substantial meaning *at the only point* at which the State has, in fact, undertaken to deprive appellant of his life.

(4) The statutes of the State of New York, here involved, are therefore repugnant to the due process clause of the 14th Amendment, since the Court of Appeals of that State has construed such statutes as authorizing the trial judge, *on sentence*, to deprive appellant of his life on the basis of information obtained by the judge after verdict, from witnesses as to whom appellant was afforded no right of cross examination or rebuttal, nor the confrontation necessary for such purposes.

Any answer to these basic propositions, which may be intended to be implied in the assumptions of the majority report, must fail with the demonstration, which has here been made, of the basic invalidity or inapplicability here of every major assumption of that opinion.

Finally, it is respectfully submitted that this Court should revise the majority opinion so as to recognize that it is both constitutionally necessary and procedurally practicable to require a State to provide such safeguards in the use of pre-sentence information as the basis of sentence in a capital case, as will reasonably minimize the risk that such information may, irreparably late, be discovered to have been in reality, pre-sentence misinformation. It is submitted that for this Court finally to hold, as does the ma-

jority opinion, that it is neither constitutionally required nor procedurally practicable that a State provide any safeguards whatever in such respects, is to risk a shocking miscarriage of justice, not only in appellant's case, but in every case where pre-sentence information is authorized to be so used.

Accordingly, it is respectfully asked that this petition for re-hearing be granted, with such stay of the mandate as is reasonably necessary to determination of this case on re-hearing.

Respectfully submitted,

JOHN F. FINERTY,
Counsel for Appellant,
120 Broadway,
New York 5, N. Y.

June 21, 1949.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for re-hearing and for stay of mandate is presented in good faith and not for delay.

JOHN F. FINERTY